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No. 97-1378

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA; WILLIAM J. JANKLOW, as Governor; JOYCE HAZELTINE, as Secretary of State; and MARK BARNETT, as Attorney General,

Petitioners

v.

SDDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

PETITIONER'S REPLY BRIEF

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Respondent's brief in opposition confirms the extraordinary nature of the proceedings in this case. SDDS does not deny that the *Lonetree IV* litigation was brought in federal court for the *sole* purpose of imposing retroactive monetary liability on the State of South Dakota. Respondent also does not take issue with our observation that the questions presented in the petition about the propriety of giving force to the *Lonetree IV* decision raise important and recurring issues of federal law. And SDDS appears to recognize that the proceedings here offer plaintiffs across the Nation a blueprint for circumventing the Eleventh Amendment by converting actions brought under *Ex parte Young*, 209 U.S. 123 (1908), into vehicles for obtaining money damages from States. Because the arguments that respondent does offer lack merit — and because the holding below cannot be reconciled with this Court's decisions — further review accordingly is warranted.

A. The Court Has Jurisdiction To Hear This Case

While SDDS initially contends (at Opp. 9-12) that the Court lacks jurisdiction to consider this case, the finality rule upon which respondent relies has "not been administered in such a mechanical fashion." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). To the contrary, several considerations make plain that this case falls squarely within the category of proceedings in which "[t]he fact that separate and unresolved issues are pending in the [state] courts and are subject to 'further proceedings' therein * * * does not render the judgment of the [state] Supreme Court on the issue here considered * * * nonfinal or unappealable within the meaning of 28 U.S.C. § 1257." *Hudson Distributors* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

To begin with, the fourth category of judgments identified as final in *Cox* includes those

> where [1] the federal issue has been finally decided in the state courts [2] with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the issue by this Court, and [3] where reversal of the

> state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. [4] In these circumstances, if a refusal immediately to review a state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483.

All of these factors are present here. (1) The court below finally decided the dispositive federal questions: whether the Eighth Circuit's decision in *Lonetree IV* was void for lack of jurisdiction, and whether that void federal judgment may bind a state court in a suit for money damages against a State. (2) The State could prevail on nonfederal grounds on remand, precluding review of the federal issue.[1] (3) Reversal of the decision below would effectively dispose of the litigation since, as we have explained (at Pet. 6-7), the South Dakota Supreme Court indicated that it was inclined to rule for the State on the takings claim were it free to do so. (4) Delaying review would "present a real danger of some irreparable injury to federal policies or constitutional concerns" embodied in the Eleventh Amendment (R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 99 (7th ed. 1993)) by requiring the State to stand trial at the behest of a federal court. See generally *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-180 (1988); *Cox*, 420 U.S. at 485-486; *Local No. 48, Construction & General Laborers' Union* v. *Curry*, 341 U.S. 542, 550 (1963).

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[1] Among other things, on remand the State will argue that it should prevail on state-law grounds of judicial estoppel, failure to provide statutory notice, and failure to mitigate damages.

In addition, entirely apart from the technical elements of *Cox*'s fourth category, the nature of the Eleventh Amendment principle at stake here requires immediate review. In response to the Eighth Circuit's judgment, the court below subjected the State to burdensome remand proceedings that otherwise would not have taken place. That injury to the State's "dignitary interests" (*Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) cannot be remedied in the future. The "fundamental constitutional protection" afforded by the Eleventh Amendment is designed both to insure that "States not be unduly burdened by litigation" and to "'prevent the indignity of subjecting a State to the coercive process of judicial tribunals'" (*id.* at 145, 146 (citation omitted)) — and it is a crucial element of the immunity that States may identify not only whether but *where* they may be sued. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985). Delaying review thus would make vindication of the State's constitutional interests impossible. Cf. *Metcalf & Eddy*, 506 U.S. at 146; *Bullington* v. *Missouri*, 451 U.S. 430, 437 n.8 (1981). And that is particularly so because the federal-court injunction may effectively preclude the State from raising federal issues relating to its liability in the future. In such circumstances, immediate review plainly is in order. See generally *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156, 163-164 (1973).

In arguing to the contrary, SDDS pointedly does *not* deny that the elements of the various *Cox* tests are satisfied here. Instead, it contends only that, under *Cox*, finality is absent whenever additional federal questions may be addressed on remand. Br. in Opp. 11. But the Court in *Cox* did not purport to set down any such hard-and-fast rule. Nor could it have; in at least one of the cases relied upon in *Cox* (420 U.S. at 484 n.11, citing *Hudson Distributors*), a federal issue was prominently featured among those to be considered on remand. See *Hudson Distributors*, 377 U.S. at 388 & n.2

(noting that case had been remanded to address Sherman Act claim).

The other finality holdings cited by SDDS (at Br. in Opp. 10-11) are simply inapposite here. SDDS thus asserts that there is no finality when a petition for certiorari presents the question whether a taking has occurred in circumstances where the case has been remanded for a determination of damages. The cases cited by SDDS, however, explain that finality is absent in such a situation "because 'the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that *integral problem*.'" *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 633 (1980), quoting *Snyder's Drug Stores*, 414 U.S. at 163 (emphasis added).[2] Here, in contrast, the petition raises *no* substantive takings issue at all, instead presenting questions about the binding effect of a federal judgment in a case seeking money damages from a State. In this setting, the issue presented here is "not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). See *Cox*, 420 U.S. at 484. The federal question offered in the petition thus is in no

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[2] Even in the circumstances of those cases, the Court did not state an absolute rule rejecting finality whenever the petition presents a takings issue and the amount of compensation remains undetermined. See, *e.g.*, *Republic Gas Co.* v. *State of Oklahoma*, 334 U.S. 62, 67 (1948) (emphasis added) (no finality in takings case, "*particularly* when the property will not change hands until after the award of compensation"); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 101 (emphasis added) (judgment that taking occurred, when amount of compensation is not yet set, "is not *usually* considered final, especially where the property will not change hands until after the award of compensation").

sense an "integral" part of the issues that remain to be decided on remand.[3]

SDDS's challenge to the Court's jurisdiction therefore lacks substance. "The critical federal question * * * has * * * already been answered by the State Supreme Court." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988). The legal issue that has been decided — which relates to the binding effect of the federal-court judgment — involves a "separate and independent matter" from the questions to be considered on remand. *Langdeau*, 371 U.S. at 558. And any delay in review will "seriously erode federal policy" (*Goodyear Atomic Corp.*, 486 U.S. at 179) and irreparably damage the State's dignitary interests. The judgment below accordingly is "ripe for review." *Mississippi Power*, 487 U.S. at 370 n.11.

B. The Court Below Decided The Federal Question Presented Here

SDDS's next contention (at Br. in Opp. 12-14) — that the federal issue was not raised or passed upon below — is wholly insubstantial. In fact, the state supreme court *expressly* decided the question presented here. That court found that the Eighth Circuit "had jurisdiction over th[e] federal constitutional matter presented in *Lonetree IV*." Pet. App. 12a. And the court below explicitly endorsed and quoted the Eleventh Amendment analysis used in *Lonetree IV* in support of the

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[3] *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481 (1997), cited by SDDS at Br. in Opp. 9-10, also is inapposite. Resolution of the federal question would not have disposed of that case; because the petitioners also had state-law claims that would have to be resolved on remand in any event, the case "present[ed] the typical situation in which the state courts have resolved some but not all of the petitioners' claims." 118 S. Ct. at 487. And unlike the South Dakota court's holding here, the interlocutory decision in *Jefferson* did not threaten significant frustration of federal policies.

state court's holding that it was "bound by the recent judgment of the Eighth Circuit." *Ibid.* See *id.* at 12a-13a. In these circumstances, there of course "can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 131 (citing cases).

While that is enough to dispose of SDDS's argument, it may be added that respondent exhibits a certain gall in faulting the State for failing to submit argument on the significance of *Lonetree IV*. While SDDS blithely chides the State because it "declined even to file a brief or submit oral argument" on the point (Br. in Opp. 6; see *id.* at 12-13), the State made clear that it took that course — and that it refrained from presenting its Eleventh Amendment arguments in a rehearing petition — because it believed that it was constrained by the federal-court injunction to withhold any argument bearing on its takings liability. See Appellees' Motion to Remove Proceeding From Oral Argument Calendar (Feb. 26, 1997); Pet. for Rehearing 1. And far from suggesting that the State could make supplemental argument on the point, SDDS threatened the State with contempt sanctions if it failed to *withdraw* the brief that it had filed in the South Dakota Supreme Court *prior* to the decision in *Lonetree IV*. See Letter to Attorney General Mark W. Barnett from Edward T. Lyons, Jr. (May 22, 1997) (reprinted in the addendum to this brief). The State therefore can hardly be thought to have surrendered its rights by failing to argue the issue below.

C. The Eighth Circuit's Decision In *Lonetree IV* Was Void For Lack Of Jurisdiction

It is perhaps understandable that SDDS is so imaginative in its procedural arguments against review, because its defense of the judgment below is entirely unavailing. In arguing that the federal judgment found binding by the South Dakota court was not void, SDDS's principal contention is that the State

waived its Eleventh Amendment immunity. This assertion, however, rests on a remarkable misreading of the record. SDDS premises its waiver argument on ¶ 24 of the state defendants' answer to SDDS's federal complaint. See Br. in Opp. 4, 15-16. But that paragraph states:

> As a[n] * * * affirmative defense, Defendants assert that Plaintiff's claim fails on the doctrine of sovereign immunity and, to the extent it can be construed to involve a claim for monetary relief, is barred by the Eleventh Amendment to the United States Constitution.

Far from being a case in which "the State of South Dakota *consented*" to suit (Br. in Opp. 14 (emphasis in original)), the State thus *asserted* its immunity to the fullest degree possible.[4]

Nor does SDDS obtain any additional mileage from its observation (at Br. in Opp. 4-5, 16) that the state defendants participated in the *Lonetree III* litigation challenging the constitutionality of the Referendum. The State has never denied that *Lonetree III*, as a suit seeking prospective relief against an ongoing (asserted) violation of federal law, could proceed against state officials under the doctrine of *Ex Parte Young*. But that cannot serve to justify the *Lonetree IV* proceeding, which was commenced long after any violation of federal law had ended, which was directed against the State rather than state officials, which was brought for the sole purpose of obtaining monetary relief against the State — and

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[4] In addition, SDDS is wrong in contending (at Br. in Opp. 15-16) that a State's appearance to defend a suit on the merits bars the State from asserting its Eleventh Amendment immunity at a later point in the litigation. In fact, it has long been settled that the Amendment may be raised at any time — and, indeed, that immunity may be asserted for the first time in this Court. See. *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467 (1945).

in which the State *expressly* asserted its Eleventh Amendment immunity. See *Lonetree IV*, 97 F.3d at 1032.

SDDS's related argument (at Br. in Opp. 17-19) that the *Lonetree IV* injunction is permissible "ancillary" relief is flawed for similar reasons. The Eleventh Amendment decisions cited by SDDS in support of this proposition all involved circumstances in which the challenged relief was necessary to terminate an *ongoing* violation of federal law. But that manifestly is not the case here. The decision in *Lonetree III* — which is hardly rendered "precatory" (Br. in Opp. 19) under the State's theory — invalidated the Referendum and terminated any violation of federal law. The *Lonetree IV* litigation concededly was intended simply to obtain monetary relief from the State, and no decision of this Court justifies such a proceeding under the Eleventh Amendment.

D. A State Court May Not Be Bound By A Federal-Court Decision Issued In Violation Of The Eleventh Amendment

SDDS also advances no substantial reason to deny review when it contends that the court below was bound by the Eighth Circuit's judgment. Respondent does not even attempt to defend the state court's holding that it was bound by the Eighth Circuit's injunction, maintaining instead that the decision below was based exclusively on res judicata and collateral estoppel principles. Br. In Opp. 21. Yet SDDS cannot show that application of those principles in this case is reconcilable with this Court's decisions — and it entirely fails to establish that the Eleventh Amendment ever permits use of a federal court judgment to bind a State in an action for money damages.

To the contrary, SDDS acknowledges (at Br. in Opp. 20) this Court's recognition that "the general rule of finality of jurisdictional determinations is not without exceptions" and may be overcome by "[d]octrines of federal pre-emption or

sovereign immunity." *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963), citing *United States* v. *United States Fidelity & Guar. Co*, 309 U.S. 506 (1940), *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), and RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948). And SDDS's attempt to distinguish *United States Fidelity & Guar.* and *Kalb* have no merit at all. Respondent's principal argument (at Br. in Opp. 20) appears to be that the state defendants' failure to file a petition in this Court challenging the *Lonetree IV* decision makes the doctrine of *United States Fidelity & Guar.* and *Kalb* inapplicable here. But that plainly is not so: the decisions that were denied res judicata and collateral estoppel effect in those cases *also* had not been challenged on direct appeal. See *United States Fidelity & Guar.*, 309 U.S. at 510; *Kalb*, 308 U.S. at 435-436 (defendant did not seek to stay or otherwise challenge judgment of foreclosure that later was collaterally attacked).

SDDS's remaining contentions are equally insubstantial. It attempts (at Br. in Opp. 20-21) to distinguish *United States Fidelity & Guar.* on the ground that (in asserted contrast to this case) the sovereign immunity claim there had not been raised and litigated in the court in which judgment first was entered. We explained in the petition (at 20 n.11), however, that the immunity issue may in fact have been litigated in the first forum in *United States Fidelity & Guar.*, and that this Court evidently did not regard the matter as significant; SDDS makes no response to that point. In addition, as we also noted in the petition (at 19), both the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (hereinafter "RESTATEMENT") (at § 96, cmt. a) and leading commentators (see 18 Moore's Federal Practice § 130.04[3] (3d ed. 1997)) read *United States Fidelity & Guar.* as an exception to the usual rule that gives res judicata effect to a "*finding by a court* that it has * * * jurisdiction over the defendant." RESTATEMENT § 96 cmt. a (emphasis added). Again, SDDS makes no response. The rule of *United States Fidelity & Guar.* thus generally is understood to apply in cases where the issue of jurisdiction

has been litigated; at worst, the issue whether sovereign immunity strips a judgment of collateral effect in such circumstances is an open question that should be settled by this Court. Cf. *Durfee*, 375 U.S. at 114 & n.12.

SDDS's discussion of *Kalb* (at Br. in Opp. 21), meanwhile, is simply mystifying. Respondent reports that *Kalb* "merely held that the state court proceedings giving rise to the appeals could be collaterally attacked in the federal bankruptcy court." In fact, the collateral attack in *Kalb* occurred in state court. But more fundamentally, SDDS evidently acknowledges the holding in *Kalb* that a determination of jurisdiction need *not* be given res judicata or collateral estoppel effect. The Court thus explained in *Kalb* that the lack of jurisdiction in the court issuing the first judgment rendered its decisions "nullities subject to collateral attack," and that this was so "whether the issue of jurisdiction was actually contested in the [first] Court, or whether it could have been contested." 308 U.S. at 439, 444 (footnote omitted). As we explained in the petition (at 20), *Kalb* thus stands for the proposition that, while a court's determination of its subject matter ordinarily is not subject to collateral challenge, a state court may not apply that "rule of res judicata when to do so would conflict with an important federal policy." RESTATEMENT § 97, cmt. c. We also noted that the Eleventh Amendment states just such a federal policy. Again, SDDS makes no response to these points. Review of the decision below therefore plainly is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1998

ADDENDUM

May 22, 1997

VIA FACSIMILE (605) 773-4106
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Hon. Mark W. Barnett
Attorney General
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Re: SDDS, Inc., v. State of South Dakota, et. al.
South Dakota Supreme Court, No. 19555

Dear Attorney General Barnett:

The State Defendants' motion requesting the Supreme Court to remove this case from the oral argument calendar explicitly acknowledged that the Eighth Circuit's decision in In re SDDS, Inc., 97 F.3d 1030 (8th Cir. 1996), together with the federal court injunction entered thereon, effectively "constrain" the State Defendants from presenting any "meaningful" oral argument in the case. This is understandable, of course, because the precise arguments that the State Defendants had previously used in this case to resist liability for the consequences of the unconstitutional referendum are now foreclosed by the decision and injunction entered in the federal courts.

But simply refraining from reasserting these arguments orally is not enough. In order to comply with the injunction, SDDS believes that it was also incumbent on the State Defendants to withdraw the brief in which these same arguments remain on display in this case. SDDS expressly questioned why this had not been done — and whether the failure to do so would violate the injunction — when it responded in writing to the State Defendants' motion to dispense with oral argument. This cautionary indication has been ignored. The State Defendants

have instead apparently determined to take their chances that in possible further proceedings in federal court, their token compliance of foregoing oral argument will be deemed sufficient to avoid any imposition of sanctions. SDDS disagrees and respectfully suggests that the State Defendants are proceeding at considerable peril.

In the event that its prior admonition was not understood, SDDS wants at this time to make it unmistakably clear to the State Defendants that, as SDDS understands the mandate and injunction of the federal courts, the brief of the State Defendants should be withdrawn immediately.

Very truly yours,

Edward T. Lyons, Jr.
Attorney for SDDS, Inc.

cc: SDDS, Inc.